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No. 465

In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment entered in the above case by the United States Court of Appeals for the Seventh Circuit on May 3, 1956, which set aside an order issued by the Federal Trade Commission.

OPINION BELOW

The opinion of the Court of Appeals (Appendix, *infra*, p. 18) is reported at 233 F. 2d 649.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, p. 29) was entered on May 3, 1956. The time for filing a petition for writ of certiorari was extended by Mr. Justice Reed on July 21, 1956, to

September 29, 1956 (Appendix, *infra*, p. 29). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Under Section 2 (b) of the Robinson-Patman Act, a seller may defend against a charge of illegal price discrimination by showing that his lower price was granted in "good faith" to meet the equally low price of a competitor. The question presented is whether the "good faith" defense can be used to justify a lower price regularly granted to certain large customers pursuant to a long established and inherently discriminatory pricing policy maintained by the seller and by major competitors.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

* * * * * *

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be sub-

stantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *

* * * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

STATEMENT

The complaint issued by the Federal Trade Commission in this case (R. 2–5) charged the respondent Standard Oil Company with price discrimination in the sale of gasoline in the Detroit metropolitan area in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. 13. It was alleged that Standard, since the date of the

Robinson-Patman Act, had regularly sold at "tank-car" prices to four large reseller accounts (each of which made substantial retail sales) while selling at higher "tank-wagon" prices to numerous other reseller accounts (approximately 350 retail service stations) in the same area. It was also alleged that the effect of the discrimination had been, and "may be," to injure, destroy, or prevent competition with each of the four reseller accounts who obtained the benefit of the lower prices (R. 3).

By its answer (R. 5–28), Standard admitted the price differential (R. 11), but sought to justify it on the ground that the function performed by the four large resellers—called "jobber" accounts by Standard—was essentially different from that performed by the other resellers (R. 12–13). The answer alleged that it was Standard's "general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers" (R. 13); that Standard employed fixed criteria for making this classification (R. 13–14); that the four resellers receiving the "tank-car" price met these criteria (R. 14); and "that such system and practice of selection and classification of customers" was an integral part of the oil industry (R. 13). The principal requirements for a "jobber" status under this "system and practice" were stated to be: a large volume of distribution (usually one to two million gallons annually), a bulk plant capable of accepting deliveries in "tank-car" quan-

ities, means of making deliveries from the bulk plant, and adequate credit rating (R. 13–14, 5388). Standard also alleged that the price differential between so-called "jobber" resellers and other resellers was justified on the basis of cost and that the lower prices accorded the "jobber" resellers were granted in good faith to meet the equally low prices of competitors.

At the conclusion of extensive proceedings, the Commission found that the classification of reseller accounts was arbitrary (R. 5168) [1]; that the various resellers, though differently classified, were actually in competition with each other (R. 5165); that the price differential occasioned competitive injury (R. 5170–5171); and that it was not justified by differences in cost (R. 5171–5178). Accordingly, the Commission issued an order to cease and desist (R. 5183–5185).

During the course of the proceedings, Standard had introduced evidence designed to show that its lower "tank-car" price had been granted in good faith to meet the equally low prices of competitors. The Commission found it unnecessary to determine this issue because of its view that under the statute the good faith defense was not available "in the face of affirmative proof that the effect of the discrimination was to injure, destroy, and prevent competition with the retail stations operated by the said named dealers and with stations operated by their

[1] Of Standard's four "jobber" customers in the Detroit area, three resold both at wholesale to service stations and at retail through owned or controlled service stations and the fourth resold exclusively at retail through its own service stations.

retailer customers." After the Court of Appeals for the Seventh Circuit affirmed, with slight modification, the Commission's cease and desist order (173 F. 2d 210), this Court held that Section 2 (b) provides an absolute defense to a charge of illegal price discrimination (340 U. S. 231). This Court accordingly reversed the judgment of the Court of Appeals and remanded the case to the Commission to make findings as to whether or not Standard's lower prices were made in good faith to meet the equally low prices of competitors (340 U. S. at 238, 251).

Pursuant to this remand, the Commission reviewed the evidence relating to the "good faith" defense and entered modified findings. It found that there was no evidence that the "tank-car" price was granted to any of the four "jobber" accounts in response to any specific competitive offer (R. 5387–5388). It found that under Standard's general method of pricing, which was established prior to the passage of the Robinson-Patman Act, the criteria used to determine (R. 5389) whether or not its "tank-car" price should be accorded to a particular customer took no account of the distributive function performed by the purchaser (R. 5388). The Commission found that this system of pricing was inherently discriminatory because based upon an arbitrary classification of competing customers (R. 5388). It found that the grant of the "tank-car" price to the four "jobber" customers was not a departure by reason of competition from Standard's established method of pricing but represented only the continued application of the pricing

standard adopted by respondent and followed by it since long before 1936 (R. 5389).

In addition, the Commission found that Standard, by reason of its long familiarity with every phase of the refining and distribution of gasoline, knew or should have known that its method of pricing on sales of gasoline to reseller accounts would probably have the effect of injuring competition among its customers; that Standard knew or should have known that the lower "tank-car" price could not be justified on the basis of cost; and that accordingly Standard, following the passage of the Robinson-Patman Act, had the duty and obligation to bring its pricing policy into conformity with the new statute (R. 5389). The Commission concluded that Standard's failure to make any bona fide attempt to do this also negatived its claim that it had granted the "tank-car" price to its four "jobber" customers in good faith to meet the equally low prices of competitors (R. 5389).

On review, the court below set aside the Commission's order. The court, while observing that there was no dispute as to the evidentiary facts, rejected the Commission's conclusion that respondent had not established its "good faith."

REASON FOR GRANTING THE WRIT.

The decision below, involving the construction of Section 2 (b) of the Robinson-Patman Act (*supra*, p. 3), is in conflict with the decisions of this Court on an important question in the administration of the Act.

1. It is now settled under Section 2 (b) that an otherwise illegal price discrimination is not prohibited by the statute if shown to have been made in good faith to meet an equally low price of a competitor. *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231 (1950). It is also well established that the burden of showing such justification is on the price discriminator. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 741 (1945).

This case is a sequel to *Standard Oil Company* v. *Federal Trade Commission, supra.*[2] There this Court, noting that the Commission had not made any findings as to whether or not Standard's discount to its so-called "jobber" customers had been granted in "good faith" to meet the equally low price of competitors (340 U. S. at 238–239), remanded the case to the Commission with directions to make those findings (340 U. S. at 238, 251).[3] The illegality of the dis-

[2] In that posture of the case, the Department of Justice did not join in defending the Commission's order because of the Department's view that the Commission's construction of Section 2 (b)—to the effect that it did not provide a complete defense—was erroneous as a matter of law. On the other hand, it is the Department's view that the decision below, setting aside the Commission's decision on remand, is similarly erroneous. Since in its decision the Court of Appeals did not reach any questions relating to the scope of the Commission's order, no discussion of those questions appears necessary or appropriate in the present petition.

[3] The court below (Appendix, *infra*, pp. 21–22) appears to suggest that the Commission and this Court, at prior stages in this proceeding, impliedly recognized Standard's "good faith." Any such suggestion is without foundation. As pointed out in the Statement (*supra*, pp. 5–6) and in the text above, the issue was not decided by either the Commission or this Court because of the nature of the Commission's construction of the statute, and this

count, apart from the "good faith" defense, was undisputed since Standard regularly and contemporaneously denied the "tank-car" price to its many other Detroit customers, when both groups of customers in fact competed in reselling the gasoline, and since Standard did not seek review of the Commission's findings that the discount was not cost-justified and that Standard's "jobber" classification was arbitrary. Cf. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 475.

On remand, relying principally on *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, and *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, the Commission concluded that Standard had failed to prove its "good faith". The correctness of this ruling, set aside by the court below, is the question now presented. The Commission's underlying findings, we submit, support its conclusion.

The Commission found that Standard, because major competitors used the same dual price formula,[4] had substantial reasons for believing that it might lose its four "jobber" accounts if it refused them the lower "tank-car" price. But this finding, the Commission held, was not determinative, particularly in view of

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Court remanded the case to the Commission for findings on that very issue. The court below (Appendix, *infra*, p. 21) is also in error in stating that the trial examiner ever recognized Standard's "good faith."

[4] Similar charges of illegal price discrimination in the Detroit area are now pending against three other gasoline companies—Gulf, Texas, and Shell. Proceedings thereon have been deferred until the disposition of this case.

its finding that the grant of the "tank-car" price to the four "jobber" customers was not a departure by reason of competition from Standard's established method of pricing but represented only the continued application of that method—a method, moreover, adopted by Standard and followed by it since long before passage of the Robinson-Patman Act in 1936 (R. 5389).[5] In short, not once did Standard, in granting the lower "tank-car" price, ever make a *reduction* from its pre-

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[5] On the question of Standard's "good faith," the Commission (Statement, *supra*, p. 7) also found: (1) that Standard knew or should have known of the probability of competitive injury resulting from its price policy; (2) that Standard knew or should have known that the price differential could not be cost-justified; (3) that passage of the Robinson-Patman Act imposed upon Standard the duty of reviewing its price policy. The court below (Appendix, *infra*, pp. 23–24) misconceived each of the three findings.

As to (1), *supra*, the court held that this theory had been repudiated by this Court in its 1949 decision. However, nothing in this Court's opinion (340 U. S. 231) even remotely indicates that knowledge of probability of competitive injury cannot be legitimately considered on the "good faith" issue. Presumably the court's reference is to the quite different matter of the completeness of the Section 2 (b) defense in the face of competitive injury.

As to (2), *supra*, the court below held that this finding was "irrelevant" because Standard had abandoned its defense of cost justification. The finding is not "irrelevant," however, on the issue of "good faith"; for example, if Standard reasonably believed the differential was cost-justified, this would help substantiate its "good faith" claim.

As to (3), *supra*, the court below held that this finding was of little consequence since "If petitioner's pricing policy was lawful prior to the [Robinson-Patman] amendment [to the Clayton Act] the same policy was lawful afterward." The court's statement, however, ignores the important changes brought about by passage of the Robinson-Patman Act.

existing price scale; the discrimination lay in the regular use of the price scale itself. Such discrimination, the Commission concluded, did not satisfy the "good faith" test enunciated in this Court's *Staley* and *Cement* decisions.

In *Staley*, a similar question was presented. There, as in the instant case, the sellers involved "never attempted to establish their own non-discriminatory price system, and then reduce their price when necessary to meet competition. Instead they slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations * * *" (324 U. S. at 754–755). There, too, the attempt was made under Section 2 (b) to justify this discriminatory pricing policy on the ground that the sellers' competitors maintained a similar pricing policy. In rejecting this defense, this Court pointed out (324 U. S. at 753):

> But § 2 (b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.

The Court added (324 U. S. at 757): "We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system * * *"

And, three years later in the *Cement* case, this Court said (333 U. S. at 725):

> Section 2 (b) permits a single company to sell one customer at a lower price than it sells to another if the price is "made in good faith to meet an equally low price of a competitor." But this does not mean that § 2 (b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case. There we said that the Act "speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition."

Accordingly, the seller's Section 2(b) defense was rejected since the pricing policy involved there was employed "as a practice rather than as a good faith effort to meet 'individual competitive situations'" (*ibid.*):

The court below sought to distinguish *Staley* and *Cement* by comparison of the pricing system involved in those cases—the so-called basing point system—with Standard's pricing formula. This attempted distinction is without basis in principle. Standard's pricing policy represented a general method of competition used not only by Standard but also by major competitors (R. 5388).[8] Standard's "tank-car" prices

[8] See note 4, *supra*.

were granted pursuant to, and were not variations from, Standard's established pricing policy. Whether prices are determined by a basing point system, or by a system of classifying customers for pricing purposes, is immaterial; for, as this Court emphasized in *Staley* and *Cement*, Section 2(b) "does not concern itself with pricing systems" (*Staley*, p. 753; *Cement*, p. 725), does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others" (*Cement*, p. 725), and relates only to "individual competitive situations" (*Staley*, p. 753; *Cement*, p. 725). This rationale is equally applicable here.

Nor can this case be distinguished on the ground, suggested by the court below, that the basing point system involved in *Staley* and *Cement*, "was utilized to stabilize or increase but never to lower prices." First, we believe the court's statement is inaccurate. With respect to many customers of a seller employing a basing point system, the effect of the system is to lower delivered prices. See *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, 731, 732. Secondly, and in any event, there is completely lacking any showing by Standard—which has the burden of proving its "good faith" defense—that the result of its pricing method has been to lower prices. No such assurance can be deduced from the mere fact that a price discrimination exists. On the contrary, where the discrimination is a permanent part of a pre-existing system or formula, there is an

inherent danger that a seller in Standard's position will attempt to manipulate its overall price scale (both the "tank-car" and "tank-wagon" prices) upward for the purpose of offsetting any reduction in its profits because of the relatively "lower" price granted to the "jobber" accounts. This danger is particularly serious where, as here, competitors employ the same dual price formula. On the other hand, where departures from a non-discriminatory price scale are made "in individual competitive situations", the probability that the consuming public will have to subsidize the price discrimination is considerably lessened.

Finally, although observing that there was no dispute as to the evidentiary facts, the court below asserted that it was "unable to discern any basis for the conclusion that petitioner's prices 'were not the result of departures from a non-discriminatory price scale'." This assertion, if it is intended to suggest that Standard did not maintain a dual price formula, is palpably erroneous. The fact is that Standard, in its answer to the Commission's complaint, frankly stated that it had a "general policy and practice" and "system and practice" "selecting and classifying customers as wholesale or jobber customers, as distinguished from retail resellers," listed what it required as qualifications for "jobber" customers, and conceded that the latter regularly received the lower "tank-car" price. See Statement, *supra*, p. 4. This was also the undisputed testimony of Standard's own witnesses.[7] And this was,

[7] Standard introduced evidence showing that it had specific requirements for a "jobber" status (R. 1890–1891); that the four large reseller accounts involved here met those requirements (R.

moreover, the position taken by Standard in its brief in this Court when the case was last here.[8] At this point in the proceeding, the issue of whether Standard maintained such a price system can hardly be regarded as open.[9] The label applied to it is of little consequence—"system," "formula," "policy," "method," "practice." What is important is that it "constantly results in [Standard's] getting more money for like goods from some customers than [it] does from others" and that it is not directed to "individual competitive situations." *Cement, supra,* p. 725. Or, as this Court held in *Staley,* p. 757, "We cannot say that a seller acts in good faith when it chooses to adopt such a clearly

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1895); that it did not accord "jobber" status to any reseller that did not meet these requirements (R. 172–174, 2084–2088, 2124); that it would rather lose "jobber" accounts than depart from those requirements (R. 1912–1916); that it had but two prices for resellers' accounts—one for "jobber" accounts and one for ordinary resellers (R. 167–169, 1899). It was also emphasized by petitioner's witnesses that this system of pricing was used not only in Detroit (R. 1890, 1897, 2065) but elsewhere in the country (R. 943, 1060, 1064, 1075, 1890) and not only by petitioner but by some of petitioner's major competitors including Texas, Gulf, and Shell (R. 319–320, 941, 1072, 1897).

[8] See, *e. g.*, pp. 3, 4, 7, 8, 42, 43 of Brief for Petitioner, *Standard Oil Co.* v. *Federal Trade Commissioner*, No. 1, 1950 Term.

[9] Equally misleading is the court's statement (Appendix, *infra*, p. 26) that "The bargaining and haggling which took place between [Standard] and the four involved ["jobber" accounts] prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system." The answer to this assertion is two-fold. First, any evidence of any "bargaining and haggling" relates to a period *prior* to the customers' compliance with Standard's requirements for a "jobber" status. Second, it was never "the Commission's theory that [Standard's] prices were reduced pursuant to a system." On the contrary, it is the Commission's position that Standard did *not* "reduce" its prices to its "jobber" accounts but rather merely applied a pre-existing discriminatory price formula.

discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system * * *."

2. The practical implications of the decision below are serious and important. According to Standard's own witnesses, Standard's dual price system is used in the Detroit area not only by Standard but also by major competitors—Gulf, Texas, and Shell—against whom similar complaints are now pending.[19] Indeed, it was on this basis that the Commission found that Standard had good reasons for believing that a refusal to continue the discount to its "jobber" accounts would mean the loss of these accounts. Under the decision below, the Commission's complaint against Standard must fall because of the availability of an "equally low price" from Gulf, Texas, or Shell. Similarly, under the court's rationale, Gulf, Texas, and Shell can defend the validity of their "jobber" discount because of the availability of Standard's discriminatory low price. In other words, as long as competing sellers follow the same discriminatory price policies, each is protected. The result is to insulate from attack a price pattern deeply entrenched in the industry—not only in the Detroit area, but also elsewhere in the country (R. 319–320, 941, 943, 1060, 1064, 1072, 1075, 1897)—long prior to passage of the Robinson-Patman Act. Moreover, the decision below actually provides a positive incentive to competing suppliers to adopt parallel pricing systems so that each can defend its own system on the basis of similar systems used by others. The Act, we believe, precludes such consequences. Cf. *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746, 754.

[19] See note 1, *supra*.

Since the Commission's decision on remand in this case, the Commission has denied "good faith" defenses under Section 2 (b) in a number of similar cases involving other industries. In these cases, two of which are now pending upon petitions for review in the court below,[11] the "good faith" defenses related to discounts, as in this case, which were not departures from an established price scale but instead merely represented a continued application of a discriminatory pricing scale used alike by the seller and by competitors of the seller. As in this case, the Commission denied the protection of Section 2 (b) to such price discrimination under the criteria enunciated by this Court in *Staley* and *Cement*. Review in the instant case, therefore, will have a controlling effect on pending litigation involving other industries, as well as on the future administration of the Robinson-Patman Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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SEPTEMBER 1956.

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[11] *E. Edelmann & Co.*, Dkt. 5770, CCH Trade Reg. Rep., ¶ 25,115; *C. E. Niehoff & Co.*, Dkt. 5768, CCH Trade Reg. Rep. ¶ 25,167.

APPENDIX

1. Opinion of the Court of Appeals

No. 11409

May 3, 1956

United States Court of Appeals for the Seventh Circuit

STANDARD OIL COMPANY, PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

Before DUFFY, Chief Judge, MAJOR and LINDLEY, Circuit Judges.

MAJOR, Circuit Judge. This proceeding originated in a complaint filed by respondent against petitioner on November 29, 1940, charging a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. A. Sec. 13, as amended). The case is now here on petition by Standard to review a modified order to cease and desist, issued by the Commission against Standard January 16, 1953. The proceeding has long been before the Commission and the courts, and a number of the original contested issues have been adjudicated. In fact, on the present review there are only two contested issues which, as stated by the Com-

mission, are: (1) whether the Commission correctly concluded that petitioner failed to establish that its lower price was made in "good faith" to meet the equally low price of a competitor within the meaning of Section 2 (b) of the Robinson-Patman Act, and (2) whether the revised order to cease and desist is warranted by the findings and properly issued. As subsequently shown, we conclude that the first issue must be decided adversely to the Commission, which renders the second issue of no consequence.

The Commission's original cease and desist order was before this court for review, wherein its enforcement, with some modification, was allowed with judgment accordingly. *Standard Oil Co.* v. *Federal Trade Commission,* 173 F. 2d 210. On appeal, the Supreme Court reversed, with instructions to this court to remand the case to the Commission to make findings in conformity with its opinion. *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231. A history of the proceeding has previously been set forth in detail both by this and the Supreme Court and need not be repeated here except insofar as it relates to the question now for decision. Also, except for the same purpose, we need not be concerned with issues previously raised and decided by the Supreme Court.

Petitioner's sales of gasoline about which the "good faith" defense revolves were made to four customers, classified by petitioner as jobbers, namely, Ned's Auto Supply Company, Stikeman Oil Company, Citrin-Kolb Oil Company, and Wayne Company. The Commission took the position originally that the "good faith" defense was not available to petitioner and therefore made no findings relative thereto. This court agreed with the Commissioner's position on that issue and affirmed. It was on this issue, however, that the Supreme Court reversed and remanded.

In response to the remandment the Commission from the original record made its modified findings, which conclude with the statement:

> For the reasons stated, the Commission is of the opinion that the respondent has not shown that the discriminatory prices allowed [naming the four customers involved] were lower prices granted in good faith to meet equally low prices of competitors. The Commission, therefore, finds the the burden imposed upon the respondent by Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, has not been sustained and that the price discriminations referred to in these findings have not been justified.[1]

Whether the decision of the Commission under the attending circumstances represents a finding of fact or a conclusion of law is of importance. We are of the view that it falls within the latter category, and this notwithstanding the statement in *Federal Trade Commission* v. *A. E. Staley Manufacturing Co., et al.*, 324 U. S. 746, 758:

> Congress has left to the Commission to determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission.

The Commission in its brief appears to recognize that its decision on this critical issue is a conclusion of law (for example, see Commission's statement of contested issues, *supra*). Certainly there is no dispute as to the evidentiary facts as found by the Ex-

[1] Two Commissioners, based upon the findings of the Trial Examiner, dissented and expressed the view that the complaint against petitioner should be dismissed.

aminer in the original proceeding. Referring thereto, the Commission in its brief states, "Here the facts as such are not in dispute, it is simply a matter of applying the law to the facts." Moreover, the Commission's decision on the "good faith" issue is the result of its process of reasoning, legal in nature, a portion of which, as we shall subsequently show, has been repudiated by the Supreme Court. Such being the case, the weight to be attached to its decision is dependent upon the reasoning by which it is reached.

Prior to a discussion of the Commission's findings now under review, we think it pertinent to observe that petitioner's good faith has been either recognized or assumed at all levels during the course of this protracted proceeding. Certainly the Examiner so found. (See footnote 7, page 238 of the Supreme Court opinion.) The Commission in its original findings took no issue with its Examiner on this score but concluded as a matter of law that the "good faith" defense was not available "in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers." In fact, there is good reason to think that the Commission at that time acquiesced in petitioner's contention that the sales in controversy were made in good faith. This court in reviewing that record (173 F. 2d 210, 216) stated:

> The showing made here by the petitioner that it made the lower price in good faith to meet competition, we assume, as the Commission apparently did, was made out. The effect of it was to rebut the prima facie case made by the Commission's proof of the petitioner's discriminatory prices. If nothing further ap-

peared in this record, the case might well have ended there.

This court also stated (page 213):

> There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that the petitioner made its low price to Ned's, Citrin, Wayne, and Stikeman in good faith to meet the lower price of a competitor.

The Supreme Court stated (page 238):

> Petitioner presented evidence tending to prove that its tank-car price was made to each "jobber" in order to retain that "jobber" as a customer and in good faith to meet a lawful and equally low price of a competitor.

After quoting from the findings of the Trial Examiner (footnote on same page), the same court on the following page, referring to the evidence, stated that it, "if accepted, would have stablished a complete defense to the charge of unlawful discrimination."

Moreover, in the findings now under review the Commission does not expressly repudiate the findings of the Examiner in the original proceeding that petitioner's reduction in price was granted to meet the equally low prices offered by competitors. The Commission, after a detailed discussion relative to the situation existing between petitioner and each of the four jobbers in controversy, states:

> It may well be that respondent was convinced that if it ceased granting tank-car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts. It had substantial reasons for believing this to be the case, for all of these concerns, except Ned's Auto Supply Company, had al-

> ready been recognized as entitled to the tank-car price under the commonly accepted standards of the industry, and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time.

It thus appears evident even under this revised version of petitioner's situation that it was confronted with the problem of reducing its price to meet competitive offers or of forfeiting the business of the four jobbers.

An attempt to enter into a discussion of all of the ramifications contained in the Commission's reasoning and argument in support of its decision against the "good faith" defense would unduly prolong this opinion. We shall, therefore, limit our discussion to a few of the more salient points as contained in the modified findings. The Commission found:

> At all relevant times, respondent knew or had the means of knowing and should have known that the manner in which it priced and sold its gasoline continually created the probability of injury to competition between retail dealers who bought such gasoline at different prices and resold it in competition with one another.

This is the same theory upon which the Commission's previous order was bottomed and which was expressly repudiated by the Supreme Court (pages 249–250).

The Commission found:

> It [petitioner] also knew or should have known that the price differences which it granted could not be justified on the basis of differences in the cost of manufacture, sale and delivery resulting from differing methods or quantities in which its gasoline was sold or delivered.

We think this statement is irrelevant to the instant issue. A cost justification defense is available under

Section 2 (a), but it is separate and distinct from the "good faith" defense provided in 2 (b). Both defenses were originally invoked by petitioner but the cost justification defense was abandoned (see footnote 2, Supreme Court opinion, page 234).

The Commission found that the Robinson-Patman amendment to the Clayton Act imposed upon petitioner "the duty and obligation of reviewing its pricing policy and taking such action as might be necessary to bring that policy into conformity with the new statute." This reasoning also appears to have been dispelled by the Supreme Court, which discusses the changes produced by the amendment and concludes with the statement, "None of these changes, however, cut into the actual core of the defense." It would thus appear that a "good faith" defense available under the Clayton Act would still be available under the amended Act. If petitioner's pricing policy was lawful prior to the amendment the same policy was lawful afterward. Such being the case, the mere fact that it did not change its policy is of little, if any, consequence.

The sole contention of the Commission which has any semblance of merit, in fact the only contention which it is entitled to make in view of the Supreme Court decision, is that petitioner adhered to a pricing system in reducing its prices to the four jobbers and that as a result the "good faith" defense cannot prevail. We suspect, as petitioner asserts, that this contention was an afterthought on the part of the Commission, advanced in an attempt to bring the case within the rule of such cases as *Federal Trade Commission* v. *A. E. Staley Manufacturing Co. et al.*, 324 U. S. 746, *Corn Products Refining Co. et al.* v. *Federal Trade Commission*, 324 U. S. 726, and *Federal Trade Commission* v. *Cement Institute et al.*, 333 U. S. 683.

Apropos to this contention the Commission found that with one exception "all of the discriminations in price involved in this proceeding were made pursuant to respondent's established method of pricing. They were not the result of departures from a non-discriminatory price scale which were made to meet lower prices of competitors, but represented only the continued application of the pricing standard previously adopted by respondent and followed by it since long before 1936."

We are not persuaded as to the accuracy of the statement contained in this quotation. The Commission, after finding that petitioner had a "method" of pricing, proceeds in its brief to a "policy" and from that to a "system." In its brief it states that petitioner had a "pricing system," irrespective of the words used to describe it. Obviously this characterization by the Commission is designed to bring the case within the scope of the system condemned by the Supreme Court in *Staley* and kindred cases. This effort must fail. The system described and condemned in *Corn Products*, later in *Staley*, and still later in *Cement*, bears not the slightest resemblance to the pricing system which the Commission purports to detect in the instant situation. The basing point system under scrutiny in those cases was labeled by the Supreme Court as unlawful and was employed by many and in some instances all members of the same industry. The system involved freight absorption and the collection of phantom freight. The system was utilized to stabilize or increase but never to lower prices. The system as pointed out in the *Cement* case eliminated all price competition and resulted in the sale of the product by all dealers at any given point at identical prices and terms. The gist of the reasoning of the Supreme Court in those cases

was that the pricing system being illegal all prices determined thereby were illegal. It follows, according to such reasoning, that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a "good faith" defense.

It is interesting and highly significant that the statute employs the language, "made in good faith to meet an equally low price of a competitor," but that the Supreme Court in the instant case adds the word "lawful," so that it reads, "made in good faith to meet a lawful and equally low price of a competitor" (pages 238 and 246). We do not know, of course, why the Supreme Court added the word "lawful," but we strongly suspect that it was for the purpose of giving emphasis to its previous decisions that a "good faith" defense was not available to a seller who had met an unlawful price. In this connection, it is also pertinent to note that in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful. Moreover, we are unable to discern any basis for the conclusion that petitioner's prices "were not the result of departures from a non-discriminatory price scale." The record affirmatively demonstrates to the contrary. Petitioner sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer. Petitioner had 362 Detroit customers, only four of which purchased at prices reduced from its uniform tank-wagon price.

The bargaining and haggling which took place between petitioner and the four involved "wholesalers" prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system. For instance, petitioner over many years refused to give Ned's, its

"most valuable tank-wagon customer," any reduction at all despite persistent demands based upon competitive offers. Its reluctant grant of a ½¢ reduction in 1936, increased to 1½¢ in 1938 in response to an "ultimatum" by Ned's, would appear to dispel completely any idea that such reduction in price was systematic, as urged by the Commission. The Commission appears to discern something sinister in the fact that a reseller might obtain the tank car price only if it maintained a bulk plant with facilities for accepting delivery of gasoline in tank car quantities; had a business in excess of one million gallons of gasoline annually; had distribution equipment and adequate credit standing. Relative to making a reduced price to a large customer, the Supreme Court in this case stated (page 249):

> For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer.

We think that a seller must be permitted in the exercise of a sound judgment to determine when and under what circumstances it will reduce its price in order to meet that of a competitor, and a right to require that a purchaser be possessed of the facilities for storing, handling, and distributing the product. The law did not require petitioner to reduce prices in any instance, it only authorized it to do so under the limitation imposed. Petitioner had the same right to reduce its price in order to retain a customer as it did to refuse to reduce with the risk of losing a customer. The "good faith" defense would be meaningless if the seller was required, as the Commission appears to indicate, to reduce its price alike to all customers re-

gardless of the quantity in which they buy, their facilities for handling the product, and their ability to pay.

Finally, the Commission finds that the "good faith" defense is not available to petitioner because its "competitors, including the three against whom similar charges of price discriminations are pending, might also defend their similar price differences on the ground of meeting respondent's equally low prices or the equally low prices of other competitors. The Commission does not construe the words 'in good faith' in Section 2 (b) as permitting that result." We are not able to discern any logic in such reasoning. Evidently from the quoted statement the Commission does not know whether three of petitioner's competitors, against whom are pending charges of price discrimination, will invoke the "good faith" defense. If they should, it will be time enough to cross that bridge when it is reached. Moreover, we know of no reason why a competitor of petitioner should not have the right to meet petitioner's price or that of any other competitor providing, of course, it did so in good faith. It is strange reasoning that one seller should be deprived of the defense provided in 2 (b) because some other seller might also invoke its protection.

In our judgment and we so hold, petitioner's "good faith" defense was firmly established, and the Commission's reasoning by which it reached a contrary conclusion is untenable and must be rejected. A decree will be entered vacating and setting aside its findings, conclusions and order issued January 16, 1953.

2. Judgment of the Court of Appeals

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

Thursday, May 3, 1956

No. 11409

Standard Oil Company, petitioner.

vs.

Federal Trade Commission, respondent.

Petition for review of order of the Federal Trade Commission

Before Hon. F. Ryan Duffy, *Chief Judge;* Hon. J. Earl Major, *Circuit Judge;* Hon. Walter C. Lindley, *Circuit Judge.*

This cause came on to be heard on the Petition for Review of an Order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the findings, conclusions and order issued by the Federal Trade Commission on January 16, 1953 be vacated and set aside.

A True Copy:
Teste:

(Sgd) Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

3. Order Extending Time for Filing Petition for Certiorari

Supreme Court of the United States

No. —, October Term, 1956

Federal Trade Commission, petitioner

v.

Standard Oil Company

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 29, 1956.

[S] Stanley Reed,
Associate Justice of the Supreme Court of the United States.

Dated this twenty-first day of July, 1956.